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Before the  
Federal Communications Commission  
Washington, D.C. 20554

DISPATCHED BY

In the Matter of	)	
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Amendment of Section 73.202(b),	)	MM Docket No. 91-58
Table of Allotments,	)	RM-7419
FM Broadcast Stations.	)	RM-7797
(Caldwell, College Station	)	RM-7798
and Gause, Texas)	)	

**MEMORANDUM OPINION AND ORDER**  
(Proceeding Terminated)

**Adopted:** July 15, 1998

**Released:** July 22, 1998

By the Commission:

1. The Commission has before it an Application for Review filed by Roy E. Henderson ("Henderson") directed to the Memorandum Opinion and Order in this proceeding, 11 FCC Rcd 5326 (1996). Bryan Broadcasting License Subsidiary, Inc. ("Bryan Broadcasting") filed an Opposition to Application for Review and Henderson filed a Reply.<sup>1</sup> For the reasons discussed below, we deny the Application for Review.

Background

2. At the request of Henderson, permittee of Station KHEN, Channel 236A, Caldwell, Texas, the Notice of Proposed Rule Making in this proceeding proposed the substitution of Channel 236C2 for Channel 236A at Caldwell, and modification of the Station KHEN construction permit to specify operation on Channel 236C2, 6 FCC Rcd 1551 (1991). In response to the Notice, the staff received two counterproposals. First, Bryan Broadcasting, licensee of Station KTZR, Channel 297C3, College Station, Texas, proposed the substitution of Channel 236C2 for Channel 297C3 at College Station, and modification of its Station KTZR license to specify operation on Channel 236C2. In order to accommodate this upgrade, Bryan

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<sup>1</sup>Henderson also filed a Motion for Stay directed to the Report and Order in this proceeding. Bryan Broadcasting filed an Opposition to the Motion for Stay and Henderson filed a Reply. In view of our action denying the Application for Review, we dismiss the Motion for Stay. In a separate vein, Henderson has filed a "Comments on Ad Hominem Attacks Contained in Pleadings Filed by Hicks/Bryan" addressing certain characterizations directed to Henderson in various Bryan Broadcasting pleadings. In general, we expect parties to address only relevant procedural and substantive matters in a proceeding. However, since this Henderson pleading is unauthorized it will not be considered.

Broadcasting proposed the substitution of Channel 297A for Channel 236A at Caldwell, and modification of the Station KHEN construction permit to specify operation on Channel 297A. The second counterproposal was filed by Henderson. That counterproposal proposed the substitution of Channel 236C2 for Channel 236A at Caldwell, and reallocation of the upgraded channel to Gause, Texas.

3. After a review of the proposals, the staff was unable to determine whether Henderson's proposed upgrade at Caldwell would provide a 70 dBu service to all of Caldwell as required by Section 73.315(a) of the Rules.<sup>2</sup> For this reason, the staff issued a Request for Supplemental Information, 7 FCC Rcd 1905 (1992), requesting specific information from both parties as to the actual and current city boundaries of Caldwell. In response, Bryan Broadcasting submitted a map depicting the city boundaries of Caldwell along with a separate statement from the Caldwell City Engineer confirming that the depicted city boundaries are accurate and current. Bryan Broadcasting also stated that the city map of Caldwell submitted by Henderson corresponds to the 1954 city map of Caldwell, and therefore was outdated. In response, Henderson submitted a recent map of Caldwell indicating that less than 4% of the area of Caldwell is outside of the 70 dBu contour containing a maximum of 25 persons.

4. In addition, the staff released an Order to Show Cause directed to Henderson to show cause why his construction permit should not be modified to specify operation on Channel 297A. 9 FCC Rcd 4425 (1994). That Order stated that the action was necessary in order to select between the competing Caldwell and College Station upgrade proposals.

5. Based upon the initial pleadings as well as information provided by the parties in response to the Request for Supplemental Information and the Order to Show Cause, the staff issued a Report and Order. In the Report and Order, the staff substituted Channel 236C2 for Channel 297C3 at College Station, and modified the Station KTSR license to specify operation on Channel 236C2. 10 FCC Rcd 7285 (1995). In order to accommodate this upgrade, the staff also substituted Channel 297A for Channel 236A at Caldwell and modified the Station KHEN construction permit to specify operation on Channel 297A. The staff decision assumed that Henderson was correct in asserting that his proposal would provide a 70 dBu signal covering 96% of Caldwell, but determined that Henderson's proposed upgrade at Caldwell was defective because it would not provide a 70 dBu signal to all of Caldwell as required by Section 73.315(a) of the Rules. The staff concluded that it would not be in the public interest to prefer a defective upgrade over a competing upgrade that complies with all technical requirements. In a related vein, the staff did not consider the Henderson counterproposal for a Channel 236C2 allotment at Gause. The reason for this was that Henderson appeared to have abandoned his Gause counterproposal by specifically stating in Reply Comments that it would "be the better course to remain with the original proposal" for a Channel 236C2 upgrade at Caldwell. In addition, the

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<sup>2</sup>In order to comply with the minimum separation requirements set forth in Section 73.207(b) of the Rules, the proposed upgrade at Caldwell from Class A to Class C2 requires a new site. The proposed Class C2 site is 32.7 kilometers (20.3 miles) northeast of Caldwell.

staff noted that the proposed reallocation from Caldwell to Gause would have removed the only broadcast facility from a community of 3,181 persons to an unincorporated community of approximately 500 persons. In such a situation, the staff stated that it would not have been able to make the requisite finding that this would have been a preferential arrangement of channels. See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989); recon, 5 FCC Rcd 7094 (1990). In the Memorandum Opinion and Order, the staff denied a Petition for Reconsideration filed by Henderson directed to that Report and Order.

6. In his Application for Review, Henderson sets forth four arguments. First, Henderson contends that his proposed upgrade at Caldwell should not have been denied because of Section 73.315(a) of the Rules. Second, Henderson states that the staff failure to consider his Gause counterproposal was without basis. Third, Henderson argues that the Order to Show Cause was "deficient and misleading." Fourth, Henderson contends that a Channel 297A allotment at Caldwell was, in fact, a short-spaced allotment. We will consider each of these arguments.

### City Coverage

7. We affirm the staff's finding that Henderson's upgrade proposal does not comply with Section 73.315(a) of the Rules and should not be favorably considered over the competing College Station proposal. Section 73.315(a) requires a licensee or permittee of an FM station to locate the station's transmitter at a site that will provide a minimum field strength of 70 dBu "over the entire principal community to be served." In his Application for Review, Henderson advances several arguments regarding compliance with Section 73.315(a), many of which raise technical issues concerning how a 70 dBu contour should be measured given possible variations in the terrain of the area in question. For the reasons described below, we reject each of these arguments.

8. Section 307(b) of the Communications Act requires us to distribute broadcast licenses and frequencies "among the several States and communities" in a "fair, efficient, and equitable" manner. Consistent with this statutory mandate and to help ensure that broadcasters provide sufficient service to their local communities, Section 73.315(a) requires that stations transmit a sufficiently strong signal, *i. e.*, 70 dBu, that encompasses their entire community of license. In order to make this determination, we employ our standard propagation methodology, which uses the F(50,50) curves to predict the distance from the station's transmitter (given its power and antenna height above average terrain) to a given signal contour, that is, to all points around the transmitter receiving the same signal strength. The F(50,50) curves are based on the propagation characteristics of radio signals in the FM band and assume average or "uniform terrain." Uniform terrain is the average terrain found in all areas of the United States, excluding sharp variations such as ridges and valleys.

9. Based on the Commission's presumption of uniform terrain and maximum permissible facilities (a maximum transmitter power of 50 kilowatts at an antenna height above average terrain of 150 meters), the 70 dBu contour of a Class C2 facility extends 32.6 kilometers from

the proposed reference site. Because the site is 32.7 kilometers from the city limits of Caldwell, the 70 dBu contour of Henderson's proposed facility would not cover any portion of Caldwell. Thus, based on uniform terrain assumptions, Henderson's proposal clearly falls short of Section 73.315(a)'s requirement that the 70 dBu contour cover the entire community of license.

10. In the proceeding below and the Application for Review, Henderson has argued that we should factor in the actual terrain characteristics in calculating the coverage of the 70 dBu contour of his proposed Caldwell facility. He asserts that using these actual conditions rather than uniform terrain assumptions, his proposed contour would extend far enough to satisfy Section 73.315(a). In particular, Henderson contended in the proceeding before the staff that, on the basis of actual terrain, the 70 dBu contour would extend 34.9 kilometers and, therefore, encompasses 96% of Caldwell.

11. We reject this contention. To facilitate predictable and efficient allotment and licensing procedures, we generally assume uniform terrain in determining compliance with Section 73.315(a) except in circumstances as set forth in Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988). Under this exception, a rulemaking proponent must, in addition to depicting actual terrain, demonstrate a reasonable assurance of the availability of the proposed transmitter site and that FAA approval of the tower has been obtained. In this regard, Henderson notes that the owner of the site, W.B. Dryden, has submitted a statement affirming the availability of the property to Henderson. This statement from the site owner does not by itself meet the requirements of the Woodstock exception because there is no indication that a tower of sufficient height could be erected with FAA approval and, if so, at what location on the Dryden property. The exact location of the tower is crucial because of the need to know the actual distance from the tower to Caldwell along the radial between the tower and Caldwell. Without knowing the relevant radial, it is not possible to examine the actual terrain on the radial and thus predict the 70 dBu coverage of the station's signal. It is also critical that the tower be at least 150 meters in height above average terrain in order for the 70 dBu contour to extend its maximum distance toward Caldwell. The only tower available on the Dryden site is only 59 meters in height above average terrain. Moreover, there is no indication that the FAA would approve an increase in this height even if this tower were available to Henderson. Consequently, at this juncture, there is no basis under Woodstock to support a conclusion that the 70 dBu signal will, given actual terrain, extend more than the 32.6 kilometers normally presumed for a Class C2 FM facility.

12. In any event, even if we were to assume that Henderson qualifies for the Woodstock exception and that his proposed 70 dBu would reach 96% of Caldwell, we are reluctant in this comparative rulemaking proceeding involving competing upgrade proposals to prefer an upgrade proposal failing to provide the requisite 70 dbu signal to 100% of its community of license, as Section 73.315(a) requires. We recognize that, where all else is the same, there would appear to be a preference for the proposed upgrade at Caldwell because it would serve an additional 48,755 persons while the upgrade at College Station will provide service to an additional 22,908 persons. All else is not the same, however, for the College Station upgrade proposal fully satisfies Section 73.315(a) while Henderson's Caldwell proposal does not. Henderson's Caldwell

proposal is therefore defective because of failing to comply with Section 73.315(a). See Terrell and Daingerfield, Texas, 5 FCC Rcd 556 (1990); see also Clemson, South Carolina, 2 FCC Rcd 3583 (1987); Wadley and Dadeville, Alabama, 60 RR2d 1462 (1986). Except for our decision in Bayshore, New York, 2 FCC Rcd 1293 (1987), and a distinguishable situation involving six communities in the implementation of BC Docket 80-90, we have not waived Section 73.315(a) at the allotment stage.<sup>3</sup> Even if we were to characterize the shortfall in principal city coverage to be de minimis, we do not believe that waiver in this situation would be appropriate because it would prejudice a competing proposal in full compliance with Section 73.315(a) of the Rules. We do not believe the public interest is best served by allowing the only broadcast station assigned to Caldwell to provide the requisite 70 dBu signal to less than the entire community of license. Moreover, the case for a waiver is further weakened by the fact that, as described above, Henderson failed to demonstrate that he could construct a tower at the proposed site that was 150 meters above average terrain and that had FAA approval. This not only undermines his argument that we should measure his 70 dBu contour using actual terrain under Woodstock, it also throws into doubt his claim that his proposed facility would reach an additional 48,755 people, since this additional coverage is premised on the construction of such a tower.

13. Having failed in his initial pleadings to demonstrate 70 dBu coverage of his community of license based on uniform terrain assumptions as well under the Woodstock exception, Henderson argues that an additional engineering submission he filed with his Petition for Reconsideration shows that he complies with Section 73.315(a). In particular, he states that this submission provides "further analyses using the more accurate determinations of a procedure developed by the National Bureau of Standards (commonly referred to as Tech Note 101)"<sup>4</sup> According to Henderson, this recent submission "verifies complete compliance" with Section 73.315(a) of the Rules.

14. Henderson did not file this engineering submission with his initial pleadings in this

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<sup>3</sup>Our action in Bay Shore is distinguishable from the Caldwell upgrade proposal. In Bay Shore, we allotted Channel 276A to Bay Shore, New York, as a first local service even though it would provide a 70 dBu signal to only 45% of Bay Shore. That action was premised on the fact that this was the only possible use of the channel because of spacing restrictions imposed by our minimum separation requirements. We also noted that the only site complying with our minimum separation requirements was Fire Island and the only available location on Fire Island was atop the historic Fire Island Lighthouse. Due to the fact that the National Park Service restricted a tower to a height to 25 feet, it was not possible to provide 70 dBu coverage to all of Bay Shore.

In Implementation of BC Docket No. 80-90, 59 RR2d 679 (1985), we reconsidered sua sponte the principal city coverage requirement regarding six of the 689 allotments initially made possible by our action in BC Docket No. 80-90. In that action, we recognized the need to provide FM allotments to six larger communities where the demand for FM allotments is the greatest. Inasmuch as only Class A channels were available, we "for [that] proceeding only" allotted these Class A channels even though they could not provide the requisite principal city coverage to an entire community.

<sup>4</sup>P.L. Rice, A.G. Longley, D.A. Norton and A.P. Barsis, "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101, first published in 1965 by the National Bureau of Standards.

proceeding, nor has he demonstrated under our Rules why we should consider these new facts at this stage of the proceeding. Section 1.115(c) of our Rules states that "[n]o application for review will be granted if it relies on questions of fact or law which the designated authority has been afforded no opportunity to pass," and section 1.106(c) of the Rules states that a petition for reconsideration which relies on facts not previously presented to the Commission or the staff may be granted only in limited circumstances. Henderson has not shown that he falls within any of these limited circumstances, and we believe that, with the exercise of ordinary diligence, he had full opportunity to present this engineering submission to the staff prior to the issuance of the Report and Order in this proceeding. Having foregone this opportunity, Henderson may not subsequently rely on this submission in seeking to overturn the Report and Order. See 47 C.F.R. §§ 1.106(c), 1.115(c).

15. Henderson advances still another argument that he complies with Section 73.315(a) in a Supplement to Application for Review filed June 16, 1997. In that Supplement, Henderson referred to a recent action involving Hempstead, Texas, in which the staff permitted an applicant for a construction permit to use the terrain roughness correction formula set forth in Section 73.313(j) of the Rules. According to Henderson, use of the terrain roughness correction formula demonstrates that his proposal will, in fact, provide a 70 dBu signal to all Caldwell. Bryan Broadcasting filed an Opposition and Henderson filed a Reply to that Opposition.

16. We have reviewed the Supplement and its engineering exhibit and have determined that this submission does not warrant a conclusion that the Henderson proposal will comply with Section 73.315(a) of the Rules. According to our calculations, the data in the Supplement would extend the 70 dBu signal one tenth of a kilometer. In reaching this conclusion, we first examined the terrain profile of the path from the proposed transmitter site to Caldwell. In accordance with Section 73.313(f) of the Rules, we used the profile segment 10 to 32 kilometers from the transmitter site to determine the terrain roughness factor or delta-h. This is the difference in elevation between the highest and the lowest elevations at certain points along the path between the antenna and the community, in this case Caldwell. Delta-h is a measure of the extent to which the terrain varies from normal terrain along that path. In this instance, we calculated delta-h as approximately 48 meters. The delta-h is then used in the formula set forth in Section 73.313 for terrain roughness correction to determine how far, if any, the 70 dBu signal would extend beyond the distance predicted by the F(50,50) curves which assumes uniform terrain. Using a delta-h value of 48 meters, the terrain roughness correction is 0.004 dBu, which represents the amount by which the signal would be enhanced.<sup>5</sup> This would extend the predicted 70 dBu signal less than one tenth of a kilometer and would not reach any portion of Caldwell.

17. Moreover, in his Supplement Henderson again has failed to demonstrate the

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<sup>5</sup>This negligible enhancement of the signal is attributable to the fact that the delta-h of 48 meters is not significantly different from 50 meters. The F(50,50) field strength chart used in determining FM coverage assumes a delta-h terrain roughness factor of 50 meters. Only where the terrain roughness "varies appreciably" from 50 meters should the terrain roughness correction be applied to the signal strengths predicted by the F(50,50) curves. See Section 73.313(i) of the Rules.

availability of a specific transmitter site and that FAA approval of that site has been obtained. As explained in paragraph 11, supra, this information is a prerequisite to permitting an exception under Woodstock from the presumption of uniform terrain; without it, it is not possible to know with assurance that the proposal, using actual terrain, will provide 70 dBu coverage to the community of license in question. While Henderson has submitted a statement from the property owner affirming the availability of a transmitter site, there continues to be no FAA approval of any specific antenna structure on this property. A reference in the Supplement to a conversation between Henderson's consulting engineer and an FAA official does not constitute FAA approval under Woodstock. In view of the above, the Supplement does not demonstrate that the proposed Class C2 facility at Caldwell will provide the requisite 70 dBu signal to Caldwell as required by Section 73.315(a) of the Rules.

18. The final argument advanced by Henderson concerning principal city coverage involves the Request for Supplemental Information and the Order to Show Cause. As stated earlier, the Request for Supplemental Information requested both Henderson and Bryan Broadcasting to submit the current boundaries of Caldwell in order to determine whether the Henderson Class C2 proposal complies with Section 73.315(a) of the Rules. In response, Henderson supplied a current map of Caldwell indicating that 96% of Caldwell would be covered by the 70 dBu contour. Thereafter, the staff adopted the Order to Show Cause directed to Henderson to show cause why his construction permit should not be modified to specify operation on Channel 297A in order to accommodate the proposed upgrade at College Station. Henderson refers to the statement in the Order to Show Cause that "both proposals in this proceeding would provide significant public interest benefits." According to Henderson, this language suggested that noncompliance with Section 73.315(a) was no longer an issue in this proceeding. As such, Henderson alleged that the Order to Show Cause was "grossly misleading and deficient" in not disclosing this fact. This argument is without merit. The Order to Show Cause was limited in scope to the proposed substitution of Channel 297A for Channel 236A at Caldwell. While this substitution would only be necessary if the proposed allotment of Channel 236C2 at College Station were approved, that underlying decision was not at issue in the show cause proceeding. Rather, the appropriate allotment of Channel 236C2 as between Caldwell and College Station was separately considered in proceedings in which Henderson participated. Henderson had been afforded the opportunity to demonstrate compliance with Section 73.315(a) in his original proposal, his comments, his reply comments and in his response to the Request for Supplemental Information. The Order to Show Cause was not the appropriate mechanism to resolve this issue or request still further information from Henderson regarding Section 73.315(a) of the Rules, nor do we believe that the statement in the Order to Show Cause that "both proposals" would provide public interest benefits can be said to have unfairly misled or prejudiced Henderson. As stated in the Report and Order, Henderson's Caldwell upgrade proposal would have provided service to an additional 48,755 persons. This is a significant public interest benefit. However, this does not support, in any way, a conclusion that the staff had made a finding that the Caldwell upgrade proposal was in compliance with Section 73.315(a) or that the staff would prefer that proposal over the competing College Station proposal that does comply with Section 73.315(a) of the Rules.

Nolanville, Texas

19. The Report and Order substituted Channel 297A for Channel 236A at Caldwell and modified the Station KHEN construction permit to specify operation on Channel 297A. In turn, this channel substitution at Caldwell permitted the proposed Channel 236C2 upgrade at College Station. According to Henderson, a Channel 297A allotment at Caldwell was short-spaced to the Channel 297A allotment at Nolanville, Texas. This argument is not persuasive. In its counterproposal, Bryan Broadcasting proposed a site restriction on the vacant Channel 297A allotment at Nolanville in order to accommodate its proposed Channel 297A substitution at Caldwell. In view of the request for a site restriction on a then vacant allotment at Nolanville, this was an acceptable counterproposal at the time it was filed. In similar situations, a rulemaking proponent could also propose an alternate channel or deletion of the allotment. In all of these situations, the appropriate forum for resolution, if ultimately necessary, of an alternate channel, site restriction or deletion is the Report and Order in this proceeding.

Gause, Texas

20. The Report and Order did not consider the Henderson counterproposal for a Channel 236C2 allotment at Gause, Texas. The reason for not doing so was the Henderson statement in Reply Comments that it would be "the better course to remain with the original proposal" for a Channel 236C2 upgrade at Caldwell. In his Application for Review, however, Henderson argues that it was never his intention to withdraw the Gause counterproposal or have it not considered. It is our view that the staff reasonably interpreted Henderson's statement in his Reply Comments in the proceeding below as indicating that he wished to abandon his Gause counterproposal. We nevertheless note that, even assuming that Henderson had not abandoned the Gause counterproposal, the staff did evaluate the Gause counterproposal in the context of this proceeding in both its Report and Order and Memorandum Opinion and Order and found that it could not be favorably considered. We concur with that conclusion.

21. In order for the Gause counterproposal to be considered in conjunction with the College Station upgrade proposal, it would first be necessary to reallocate Channel 236 from Caldwell to Gause. To do so, we must make a finding that this would have resulted in a preferential arrangement of allotments. See Modification of FM and TV Authorizations to Specify a New Community of License, *supra*. In comparing Caldwell and Gause, we could not have made such a finding. This proposal would have removed the only FM allotment from Caldwell, a community of 3,181 persons, to Gause, an unincorporated community of approximately 500 persons.<sup>6</sup> Under the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982), we concur with the staff that an FM allotment at Caldwell

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<sup>6</sup>It is important to note that the only mention of Gause in the 1990 U.S. Census is a listing of "Gause-Milano" as a Census County Division. A Census County Division is delineated by the Census Bureau and used for statistical purposes where there are no established minor civil divisions. A Census County Division has no legal function or governmental function. In view of the above, any reallocation proceeding would have necessitated a detailed analysis to determine whether Gause is a community for allotment purposes.



would be preferred over an allotment at Gause and such a proposal would not have been favorably considered.<sup>7</sup>

22. We note that Henderson, in his counterproposal, suggested that Channel 274A could be allotted to Caldwell as a replacement allotment. However, neither Henderson nor any other party expressed an interest in applying for this channel. In the absence of such an expression of interest, we will not allot a channel. See Murray, Kentucky, 3 FCC Rcd 3016 (1988); Pine, Arizona, 3 FCC Rcd 1010 (1988). On May 4, 1992, one year after the filing of his counterproposal not containing an expression of interest in a Channel 274A allotment at Caldwell, Henderson filed a "Supplemental Information Response" responding to the staff Request for Supplemental Information. In that Response, Henderson stated: "It is further noted that to the extent that the Commission's duopoly rules have been relaxed and to the extent that those rules would allow him to do so, while at the same time owning and operating a station on channel 236C2 in Gause, Henderson would also commit here to apply to construct and operate on channel 274A or any replacement channel allocated to Caldwell as part of that reallocation." This commitment was contingent on multiple ownership rules being in effect at the time the applications would be filed which would permit such common ownership. As such, the Henderson commitment was equivocal and did not constitute a valid expression of interest. We also note that this expression of interest was untimely and could not be accepted in a contested proceeding. See Amor Family Broadcasting Group v. FCC, 918 F2d 960 (D.C. Cir. 1990); cf. Waldron, Arkansas, 6 FCC Rcd 2590 (1991).

23. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Roy E. Henderson IS DENIED.

24. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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<sup>7</sup>The FM allotment priorities are as follows: 1) First fulltime aural service; 2) Second fulltime aural service; 3) First local service; and 4) Other public interest matters. Co-equal weight is given to Priorities 2 and 3. Regarding two competing proposals for a first local service, the community with the larger population would be favored.

25. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary